



Statement by the Court of Appeal

FARUK ORMAN v THE QUEEN

26 July 2019

Maxwell P, Niall and Emerton JJA

- 1 On 29 September 2009, Faruk Orman was found guilty by a Supreme Court jury of the murder of Victor Peirce. He was sentenced to 20 years' imprisonment, and a non-parole period of 14 years was fixed.
- 2 On 21 September 2010, this Court refused his application for leave to appeal against that conviction and, in February 2011, the High Court refused special leave to appeal.
- 3 On 4 February this year, Mr Orman filed a petition of mercy with the Attorney-General, seeking a referral to this Court pursuant to s 327 of the *Criminal Procedure Act 2009*. He provided detailed submissions and evidence in support of the petition in April and May 2019. Among other things, the petition alleged that he was denied a fair trial because of the conduct of Nicola Gobbo and her role as a human source for Victoria Police.
- 4 On 25 June this year, the Attorney-General advised the Chief Justice that she had decided to refer the whole case to the Court of Appeal. That means, under s 327(2) of the *Criminal Procedure Act*, that the Court of Appeal 'must hear and determine the case as if it were an appeal'.
- 5 Following that referral, Mr Orman filed an application for bail pending the

hearing and determination of the appeal. The bail application first came before the Court on 10 July 2019, and was adjourned to 2 August 2019. Subsequently, the Director of Public Prosecutions requested that the matter be brought on at an earlier date.

6 The bail application was supported by an affidavit of Mr Orman's solicitor, which included a number of allegations about Ms Gobbo's conduct. In a written response filed on 24 July, the Director has indicated that the Crown does not accept the factual basis for the majority of the allegations.

7 Four allegations in particular are disputed, for reasons set out in the response. It is unnecessary for present purposes to deal with those matters. The Director has foreshadowed that her response will be made available today.

8 What is significant is that the Director's response makes a number of factual concessions, which include the following:

- (a) from as early as October 2002, Ms Gobbo represented a person ('witness Q'), on whose evidence the murder case against Mr Orman substantially depended. Ms Gobbo continued to represent witness Q from time to time until 8 August 2008;
- (b) on 11 October 2006, Ms Gobbo was engaged by Mr Orman to represent him in relation to charges he was then facing in Queensland. She continued to represent him from time to time until at least 10 December 2008;
- (c) on 9 November 2007, at a time when she was engaged to act on behalf of Mr Orman, Ms Gobbo improperly took active steps to ensure that witness Q gave evidence against Mr Orman in the murder trial.

9 The Crown concedes that, as a result of Ms Gobbo's conduct on 9 November 2007, there was a substantial miscarriage of justice, within the meaning of s 276(1)(c) of the *Criminal Procedure Act*. The Crown's submission is that the appeal must therefore be allowed.

Disposing of the appeal

10 In our view, the Crown’s concession is properly made. We proceed on the basis of the facts conceded by the Director. Because of that concession, it has not been necessary for the Court to undertake any factual investigation of its own. Nor, of course, do we need to say anything about the contested factual allegations.

11 The Director concedes that Ms Gobbo, while acting for Mr Orman, pursued the presentation of the principal evidence against him on the charge of murder. Self-evidently, that conduct was a fundamental breach of her duties to Mr Orman and to the Court. We refer, as did the Director, to the following statement of the High Court in *Tuckiar v The King*:

Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance.¹

12 On the facts as conceded, Ms Gobbo’s conduct subverted Mr Orman’s right to a fair trial, and went to the very foundations of the system of criminal trial. There was, accordingly, a substantial miscarriage of justice.² The appeal must therefore be allowed.

13 The question which then arises is whether there should be an order for a new trial or whether, instead, a judgment of acquittal should be entered. Those are the relevant options under s 277(1) of the *Criminal Procedure Act*.

14 The Director draws attention to the decision of the High Court in *DPP (Nauru) v Fowler*, which requires the Court in deciding whether or not to order a new trial to take into account —

any circumstances that might render it unjust to the accused to make

¹ (1934) 52 CLR 335, 347.

² See *Wilde v The Queen* (1988) 164 CLR 365, 373. *OKS v Western Australia* [2019] HCA 10, [36].

him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused.³

- 15 Although witness Q's evidence is said to be 'in theory, still available', and the Crown does not concede that it is inadmissible, it is nevertheless conceded that it would be unjust to order a re-trial. This is said to be so because there has been 'significant time' since the events the subject of the charge took place. Further, the Director says, Mr Orman:

has already served a significant portion of his non-parole period and by the time any re-trial is heard, subject to any grant of bail, he will have served more.

- 16 In our view, that concession is also properly made. We will order that the appeal be allowed, the conviction for murder set aside and in its place a judgment of acquittal be entered for the offence of murder.

³

(1984) 154 CLR 627, 630.